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Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. L.B. Foster Company and Portec Rail Products, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *L.B. Foster Company and Portec Rail Products, Inc.,* Civil Action No. 1:10–cv–02115. On December 14, 2010, the United States filed a Complaint alleging that the proposed acquisition by L.B. Foster Company ("Foster") of Portec Rail Products, Inc. ("Portec") would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Foster to divest Portec's entire rail joint operations (excluding some assets in the United Kingdom), including Portec's manufacturing facility located in Huntington, West Virginia and tangible and intangible assets associated with Portec's rail joints, as well as assets used to manufacture and sell certain other related and complementary products currently manufactured at the Huntington facility. The proposed Final Judgment requires that these assets be sold to Koppers Inc. Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: (202) 514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations. Public comment is invited within 60 days of the date of this notice. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530 (telephone: (202) 307–0924).

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District Of Columbia

United States of America, United States Department of Justice, Antitrust Division, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530, Plaintiff

v.

L.B. Foster Company, 415 Holiday Drive, Pittsburgh, Pennsylvania 15220, and Portec Rail Products, Inc., 900 Old Freeport Road, Pittsburgh, Pennsylvania 15238, Defendants.

Case: 1:10–cv–02115.
Assigned To: Urbina, Ricardo M.
Assign. Date: 12/14/2010.
Description: Antitrust.

Complaint

The United States of America ("United States"), acting under the direction of the Attorney General of the United States, brings this civil antitrust action against Defendants L.B. Foster Company ("Foster") and Portec Rail Products, Inc. ("Portec") to enjoin Foster's proposed acquisition of Portec and to obtain other equitable relief. The United States complains and alleges as follows:

I. Nature of the Action

1. On February 16, 2010, Foster and Portec entered into an Agreement and Plan of Merger ("Merger Agreement"). Pursuant to the Merger Agreement, on February 26, 2010, Foster made a cash tender offer to acquire all the outstanding shares of common stock of Portec for $11.71 per share. On August 30, 2010, Foster increased its offer to $11.80 per share. The transaction is valued at approximately $114 million.

2. In the United States, Foster's proposed acquisition of Portec likely would substantially lessen competition in two separate product markets—bonded insulated rail joints ("bonded joints") and polyurethane-coated insulated rail joints ("poly joints"). Foster and Portec are virtually the only manufacturers of bonded joints in the United States and currently supply approximately 95 percent of the market. For many customers, Foster and Portec are the only approved suppliers of these joints. In addition, Foster and Portec are two of only three suppliers of poly joints in the United States and currently supply approximately 54 percent of the market.

3. Elimination of the competition between Foster and Portec likely will result in Foster's ability to unilaterally raise prices of bonded joints and poly joints to most customers. The proposed acquisition also likely would reduce Foster's incentive to invest in innovation in bonded joints. In addition, by eliminating Portec as a supplier, the acquisition increases the likelihood of coordinated interaction between Foster and the other supplier of poly joints.

4. As a result, the proposed acquisition likely would substantially lessen competition in the development, manufacture, and sale of bonded joints and in the development, manufacture, and sale of poly joints in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

II. The Defendants

5. Foster is incorporated in Pennsylvania and has its headquarters in Pittsburgh, Pennsylvania. It manufactures and distributes numerous products and services for the rail, construction, energy, and utility industries and has approximately 30 locations throughout the United States. For the rail industry, Foster manufactures, among other products, bonded joints, poly joints, tie plates, and rails. Foster had total revenues of approximately $512 million in 2008 and approximately $382 million in 2009.

6. Portec is incorporated in West Virginia and has its headquarters in Pittsburgh, Pennsylvania. Portec also manufactures and distributes numerous products and services for the rail industry and other industries. For the rail industry, Portec manufactures, among other things, bonded joints, poly joints, rail lubricators, end posts, and curv blocks. Portec has several locations in the United States and abroad. Portec had total revenues of approximately $109 million in 2008 and approximately $92.2 million in 2009.

III. Jurisdiction and Venue

7. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. 4 and 25, as amended, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

8. Defendants develop, manufacture, and sell bonded joints, poly joints, and other products in the flow of interstate commerce. Defendants' activities in the

development, manufacture, and sale of these products substantially affect interstate commerce. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

9. Defendants have consented to venue and personal jurisdiction in this judicial district.

IV. Trade and Commerce

A. Background

(1) Insulated Rail Joints

10. Railroad tracks are divided into discrete sections, called track circuits. Electricity flows through the rail in each track circuit. Each track circuit is electrically isolated from the others. As the train enters a track circuit, the circuit allows the train to signal that it is passing through that particular circuit, which leads to the operation of automatic signals at rail crossings and switches farther up the line. The track circuit also enables the railroad operator to monitor the location of the trains.

11. Railroad tracks are generally welded together, within a track circuit, forming the strongest possible bond. However, welding cannot be used to connect the pieces of rail between separate track circuits because that would allow the electric current to flow between the circuits and interfere with a train's signaling. Using an insulated rail joint is the only method available to connect the rail pieces at the ends of the track circuits and insulate the circuits from one another. Rail joints consist of steel bars that are bolted onto the ends of each of the rail pieces and are used to connect the abutting ends of the rails. Insulated rail joints are joints that are used to break the electric current flowing through the rail, using a material placed on the steel bars and between the two abutting pieces of rail.

12. The reliability of an insulated rail joint is critical to the safety and efficient operation of the railroad. It is difficult to develop and manufacture insulated rail joints that can successfully withstand railroads' usage without failing, particularly in the most demanding applications. Rail connected by a rail joint is inherently weaker than rail that has been welded together. If the joint is subjected to heavy usage—for example, because the track it is on frequently carries heavily loaded rail cars—the joint may wear down over time and eventually break. In addition, an insulated rail joint may lose its insulating properties. If an insulated rail joint fails, the railroad operator will not know the location of the train and the signals will not operate properly. At the extreme, the failure of an insulated rail joint could cause a train derailment. At the least, failure of an insulated rail joint could cause the railroad to expend significant amounts of money determining the location of and replacing the failed joints. It could also bring the operation of the railroad to a halt while the failed joints are replaced.

13. Ensuring that the insulated rail joints will last for the expected life of the joint without failure is vital to the railroads. It is costly to replace these joints and an unscheduled replacement can disrupt the operations of the railroad. As a result, the largest U.S. railroads, called Class 1 railroads, engage in extensive, multi-year testing to ensure that any new insulated rail joint, or any insulated rail joint offered by a new supplier, will meet their reliability and quality needs. The railroads must be assured that the joints are designed to last and the supplier's manufacturing processes are sufficiently well controlled that all joints will last the requisite time without failing.

14. Railroads gain substantially from improvements in the reliability and effective life of insulated rail joints. Therefore, railroads have made research and development associated with these joints an important component of the competitive process. Manufacturers must make substantial investments in research and development to compete effectively for the business of the major railroads.

15. The two primary types of insulated rail joints are bonded joints and poly joints. Customers seek bids for either bonded joints or poly joints, based on the particular application.

(2) Bonded Joints

16. Bonded joints use epoxy in addition to bolts to bind the steel bars to the rails. With the addition of epoxy, the rails, bars, bolts, and insulating material that make up the joint are less subject to movement when a railcar passes over the joint and thus suffer less wear and tear. As a result, bonded joints are able to withstand the heaviest loads for extended periods of time. Because of their strength, certain of Foster's and Portec's bonded joints typically are guaranteed to last until 500 million gross tons have passed over the joints.

17. The strength of bonded joints makes them necessary for the freight railroads' high-usage main track lines. This is especially true for the Class 1 railroads, which handle most of the heavy rail traffic in the United States. No other insulated rail joint is strong enough to withstand the heavy loads on these lines. Bonded joints are also necessary for some heavily traveled areas on main passenger lines and regional and short line railroads.

(3) Poly Joints

18. Poly joints can be used to electrically isolate track circuits from one another. In contrast to bonded joints, poly joint components are not bound together by epoxy. Instead, electrical insulation in poly joints is provided by a polyurethane-covered bar that is bolted to the rail. No mechanism is added to provide additional strength, and nothing binds the joint to the rails except the bolts. Poly joints are not as strong and long lasting as bonded joints. They are significantly less expensive than bonded joints.

19. Poly joints are generally used by Class 1 railroads to create track circuits in areas with lesser loads and traffic than on the main tracks, or on other less-heavily used sections of track. Poly joints also may be used as temporary replacements for bonded joints, but only until bonded joints can be installed. In addition, poly joints are used by some passenger railroads or other smaller railroads, which carry less weight on their tracks.

B. Relevant Markets

(1) Bonded Joints

20. The development, manufacture, and sale of bonded joints in the United States is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

21. Bonded joints have specific applications, for which other types of joints can rarely, if ever, be employed. Bonded joints are typically used on the main tracks of the freight railroads. Other types of joints, such as poly joints, cannot handle over time the heavy loads on these tracks because they are not strong enough.

22. The vast majority of Foster's and Portec's sales of bonded joints are made to large customers located in the United States. Major U.S. customers consider only those suppliers of bonded joints located in the United States because of these suppliers' proximity to their rail lines. A supplier's proximity to customers' rail lines reduces both freight costs, which are a significant factor in the final cost of a bonded joint, and delivery times, and allows better customer service.

23. A small but significant increase in the price of bonded joints would not cause U.S. customers of bonded joints to substitute a different joint or other product, reduce purchases of bonded joints, or turn to suppliers outside the United States, in volumes sufficient to make such a price increase unprofitable.

(2) Poly Joints

24. The development, manufacture, and sale of poly joints in the United States is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

25. A customer whose requirements will be satisfied by a poly joint would rarely, if ever, substitute a bonded joint, even if the price of poly joints were to rise.

26. The three primary suppliers of poly joints in the United States ship poly joints to customers located throughout the United States. Because all three suppliers are located within approximately 200 miles of one another, customers pay only minimal differences in freight costs. U.S. customers of poly joints consider only those suppliers located in the United States to avoid higher freight costs, reduce delivery times, and allow better customer service.

27. A small but significant increase in the price of poly joints would not cause U.S. customers of poly joints to substitute a different joint or other product, reduce purchases of poly joints, or turn to suppliers outside the United States, in volumes sufficient to make such a price increase unprofitable.

C. Market Participants

(1) Bonded Joints

28. Foster and Portec are the only significant competitors in the U.S. market for bonded joints. Currently, Foster and Portec sell approximately 51 and 44 percent, respectively, of U.S. bonded joints. One other company accounts for the remaining five percent of this market. In addition, this third competitor does not have the same commitment to research and development as Foster and Portec. As a result, the combination of Foster and Portec will create a virtual monopoly in the U.S. market for bonded joints.

(2) Poly Joints

29. Foster, Portec, and one other company are the only competitors in the U.S. market for poly joints. Currently, Foster and Portec sell approximately 21 and 33 percent, respectively, of U.S. poly joints. The third competitor accounts for the remaining sales in this market.

V. Competitive Effects

A. Bonded Joints

30. Foster's proposed acquisition of Portec likely would substantially lessen competition in the U.S. market for bonded joints. Foster and Portec are the two primary suppliers of bonded joints to most U.S. customers. If the acquisition is not enjoined, the combined firm would supply approximately 95 percent of the bonded joints in the United States. Using a measure called the Herfindahl-Hirschman Index ("HHI") (explained in Appendix A), the HHI would increase by approximately 4,500 points, resulting in a post-acquisition HHI of more than 9,000 points.

31. Foster's and Portec's bidding behavior often has been constrained by the possibility of losing sales of bonded joints to the other. For many customers of bonded joints, Foster and Portec are either the only sources, or the two best sources.

32. Customers have benefitted from the competition between Foster and Portec for sales of bonded joints by receiving lower prices. In addition, Foster and Portec have competed vigorously by providing innovations that have resulted in higher-quality and longer-lasting joints. The combination of Foster and Portec would eliminate this competition and its future benefits to customers. Post-acquisition, Foster likely would have the incentive and gain the ability profitably to increase prices, reduce quality, reduce innovation, and provide less customer service compared to these aspects of competition absent the acquisition. The small remaining competitor has limited customer acceptance and would not have the ability to make additional sales sufficient to discipline post-acquisition anticompetitive effects.

33. The proposed acquisition, therefore, likely would substantially lessen competition in the United States for the development, manufacture, and sale of bonded joints. This likely would lead to higher prices, lower quality, less customer service, and less innovation in violation of Section 7 of the Clayton Act.

B. Poly Joints

34. Foster's proposed acquisition of Portec likely would substantially lessen competition in the U.S. market for poly joints. If the acquisition is not enjoined, the combined firm would supply approximately 54 percent of the poly joints in the United States. The HHI would increase by more than 1,300 points, resulting in a post-acquisition HHI of more than 5,000 points.

35. Foster's and Portec's bidding behavior often has been constrained by the possibility of losing sales of poly joints to the other.

36. Customers have benefitted from competition between Foster, Portec, and the other competitor by receiving lower prices. The products of the three firms are to some degree different, and the elimination of Portec likely would allow the two remaining competitors to increase prices. The combination of Foster and Portec would eliminate the significant competition between Foster and Portec and its future benefits to customers. Post-acquisition, Foster likely would have the incentive and gain the ability to profitably increase prices and provide less customer service compared to these aspects of competition absent the acquisition.

37. In addition, by reducing the number of competitors in the U.S. market for poly joints from three to two, Foster and its only remaining competitor likely would gain the incentive and ability to raise prices through coordinated interaction by directly increasing prices, allocating customers, or restricting output or capacity. Coordination would be more likely or more effective because, with two significant competitors in the market, both could be reasonably certain of the identity of the other's customers, likely making cheating, such as discounting, easier to detect and discipline.

38. The proposed acquisition, therefore, likely would substantially lessen competition in the United States for the development, manufacture, and sale of poly joints. This likely would lead to higher prices and less customer service in violation of Section 7 of the Clayton Act.

VI. Difficulty of Entry

A. Bonded Joints

39. Sufficient, timely entry of additional competitors into the U.S. market for bonded joints is unlikely. Therefore, entry or the threat of entry into this market is not likely to prevent the harm to competition caused by the elimination of Portec as a supplier.

40. Firms attempting to enter the U.S. market for the development, manufacture, and sale of bonded joints face several significant impediments to rapid, successful, and profitable entry. The new supplier of bonded joints must develop and successfully operate a production process that consistently produces a large number of high-quality bonded joints that meet the rigorous specifications set by the railroads. In addition, a new entrant must be committed to investing in research and development to meet the railroads' ongoing desire for innovation. The design for bonded joints is continually evaluated in order to improve the strength and longevity of the joints. The technical know-how and expertise necessary to consistently manufacture a large number of high-quality bonded

joints and to design improvements that pass customers' qualification tests are difficult to obtain and learned only after years of direct experience.

41. Further, a new supplier's bonded joint must pass potential customers' approval processes by demonstrating that the joints can meet rigorous quality and performance standards and perform well over time with heavy freight loads. For example, many railroads, especially the Class 1 railroads, insist that new bonded joints undergo laboratory testing plus several years of in-track testing. Railroads want to observe that the joints perform well over time before installing a significant number on their tracks. Moreover, attempts for approval are not guaranteed to be successful, and the approval process can take several years, especially if the first few attempts for approval are not successful. Because each customer's specifications may be unique, approval by one customer does not guarantee approval by any other customer.

42. For these reasons, entry by new firms or the threat of entry by new firms into the U.S. market for the development, manufacture, and sale of bonded joints would not defeat the substantial lessening of competition that likely would result if Foster acquires Portec.

B. Poly Joints

43. Sufficient, timely entry into the U.S. market for poly joints is also unlikely. Therefore, entry or the threat of entry into this market is not likely to prevent the harm to competition caused by the elimination of Portec as a supplier.

44. The expertise to design and implement a process to manufacture a large number of high-quality poly joints on a consistent basis is difficult to obtain and takes years of experience to develop. In addition, a new poly joint supplier must obtain approvals from the railroads by demonstrating that its joints can meet the railroads' rigorous quality and performance standards. This rigorous approval process can take eighteen months or more. Further, attempts for approval are not guaranteed to be successful and can take several years, especially if the first few attempts for approval are unsuccessful.

45. For these reasons, entry by new firms or the threat of entry by new firms into the U.S. market for the development, manufacture, and sale of poly joints would not defeat the substantial lessening of competition that would likely result if Foster acquires Portec.

VII. The Proposed Acquisition Violates Section 7 of the Clayton Act

46. Foster's proposed acquisition of Portec likely would substantially lessen competition in the development, manufacture, and sale of bonded joints and the development, manufacture, and sale of poly joints in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

47. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects, among others:

(a) Actual and potential competition between Foster and Portec in the markets for the development, manufacture, and sale of bonded joints and the development, manufacture, and sale of poly joints in the United States would be eliminated;

(b) Competition in the markets for the development, manufacture, and sale of bonded joints and the development, manufacture, and sale of poly joints in the United States likely would be substantially lessened;

(c) For bonded joints in the United States, prices likely would increase and quality, customer service, and innovation likely would decrease; and

(d) For poly joints in the United States, prices likely would increase and customer service likely would decrease.

VIII. Requested Relief

48. The United States requests that this Court:

(a) Adjudge and decree that Foster's acquisition of Portec would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) Preliminarily and permanently enjoin and restrain Defendants and all persons acting on their behalf from consummating the proposed acquisition of Portec by Foster, or from entering into or carrying out any other contract, agreement, plan, or understanding, the effect of which would be to combine Foster with Portec;

(c) Award the United States its costs for this action; and

(d) Award the United States such other and further relief as the Court deems just and proper.

For Plaintiff United States of America:
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Dated: December 14, 2010.

Appendix A

Definition of HHI

The term "HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* § 5.3 (issued by the U.S. Department of Justice and the Federal Trade Commission on Aug. 19, 2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets will be presumed likely to enhance market power. *Id.*

United States District Court for the District of Columbia

United States of America, Plaintiff

v.

L.B. Foster Company and *Portec Rail Products, Inc,*. Defendants.
Case: 1:10–cv–02115.
Assigned To: Urbina, Ricardo M.
Assign. Date: 12/14/2010.
Description: Antitrust.

Competitive Impact Statement

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

Defendants L.B. Foster Company ("Foster") and Portec Rail Products, Inc. ("Portec") entered into an Agreement and Plan of Merger, dated February 16, 2010. Pursuant to the Merger Agreement, on February 26, 2010, Foster made a cash tender offer to acquire all the outstanding shares of common stock of Portec for $11.71 per share. Foster later

increased its offer to $11.80 per share. The transaction value is currently approximately $114 million.

The United States filed a civil antitrust Complaint on December 14, 2010, seeking to enjoin the proposed acquisition, alleging that it likely would substantially lessen competition in two separate product markets—bonded insulated rail joints ("bonded joints") and polyurethane-coated insulated rail joints ("poly joints")—in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Foster and Portec are virtually the only manufacturers of bonded joints in the United States. The loss of competition from the acquisition likely would result in higher prices, lower quality, less customer service, and less innovation in the development, manufacture, and sale of bonded joints in the United States. In addition, Foster and Portec are two of only three suppliers of poly joints in the United States. The loss of competition from the acquisition likely would result in higher prices and less customer service in the development, manufacture, and sale of poly joints in the United States.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects that would result from Foster's acquisition of Portec. Under the proposed Final Judgment, which is explained more fully below, Foster is required to divest Portec's entire rail joint business,[1] including Portec's only U.S. manufacturing facility, located in Huntington, West Virginia. Foster is also required to divest several other products currently manufactured in Portec's Huntington facility. Under the terms of the Hold Separate, Foster's and Portec's operations will remain entirely separate until the divestiture takes place. Pursuant to the Hold Separate, Foster and Portec must take certain steps to ensure that the assets being divested continue to be operated in a competitively and economically viable manner and that competition for the products being divested is maintained during the pendency of the divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violations

A. The Defendants

Foster manufactures and distributes numerous products and services for the rail, construction, energy, and utility industries. For the rail industry, Foster manufactures, among other products, bonded joints, poly joints, tie plates, and rails. Foster had total revenues of approximately $512 million in 2008 and approximately $382 million in 2009. Foster supplies approximately 51 percent of the bonded joints and 21 percent of the poly joints in the United States.

Portec also manufactures and distributes numerous products and services for the rail industry and other industries. For the rail industry, Portec manufactures, among other things, bonded joints, poly joints, rail lubricators, end posts, and curv blocks. Portec had total revenues of approximately $109 million in 2008 and approximately $92.2 million in 2009. Portec supplies approximately 44 percent of the bonded joints and 33 percent of the poly joints in the United States.

B. The Competitive Effects of the Acquisition on the U.S. Markets for Bonded Joints and Poly Joints

1. Relevant Markets

Railroad tracks are divided into discrete sections, called track circuits. Electricity flows through the rail in each track circuit, and each track circuit is electrically isolated from the others. As the train enters a track circuit, the circuit allows the train to signal that it is passing through that particular circuit, which leads to the operation of automatic signals at rail crossings and switches. The track circuits also enable the railroad operator to monitor the location of the trains. Most pieces of railroad track are welded together within a track circuit, forming the strongest possible bond. However, welding cannot be used to connect the pieces of rail between separate track circuits because that would allow the electric current to flow between the circuits and interfere with the train's signaling. Using an insulated rail joint is the only method available to connect the rail pieces at the ends of the track circuits and insulate the circuits from one another. Rail joints consist of steel bars that are bolted onto the ends of each of the rail pieces and are used to connect the abutting ends of the rails. Insulated rail joints contain material placed on the steel bars and between the two abutting pieces of rail, which prevents the electric current from flowing between the track circuits.

The reliability of an insulated rail joint is critical to the safety and efficient operation of the railroad. It is difficult to develop and manufacture insulated rail joints that can successfully withstand railroads' usage without failing, particularly in the most demanding applications. Rail connected by a rail joint is inherently weaker than rail that has been welded together, and if the joint is subjected to heavy usage, the joint may wear down over time and eventually break. An insulated rail joint may also lose its insulating properties over time. The consequences of a failed insulated joint can be quite serious, as the railroad operator will not know the location of the train and the signals will not operate properly.

It is vital to the railroads that insulated rail joints last for their expected life without failure. To that end, the largest U.S. railroads engage in extensive, multi-year testing to ensure than any new insulated rail joint product, or any insulated rail joint offered by a new supplier, will meet their reliability and quality needs. The railroads must be assured that the joints are designed to last and the supplier's manufacturing processes are sufficiently well controlled that all joints will last the requisite time without failing. Railroads gain substantially from improvements in the reliability and effective life of joints. Consequently, research and development is an important component of the competitive process, and insulated joint manufacturers must make substantial investments in research and development to compete effectively for sales to the major railroads.

The two primary types of insulated rail joints are bonded joints and poly joints. Customers seek bids for either bonded joints or poly joints, based on the particular application. Bonded joints use epoxy in addition to bolts to bind the steel bars to the rails. With the addition of epoxy, the rails, bars, bolts, and insulating material that make up the joint are less subject to movement when a railcar passes over the joint, and thus suffer less wear and tear. Bonded joints are able to withstand the heaviest loads for extended periods of time, and are typically guaranteed to last until 500 million gross tons have passed over them.

Because of their strength, bonded joints are necessary for the freight railroads' high-usage main track lines. This is especially true for the Class 1 railroads, which are the largest U.S. railroads and handle most of the heavy freight rail traffic in the United States. No other insulated rail joint is strong enough to withstand the heavy loads on these lines over time. Bonded joints are also necessary for some heavily traveled areas on main passenger lines and regional and short line railroads. Bonded joints have specific applications, for which any other type of joint can rarely, if ever, be employed.

The vast majority of Foster's and Portec's sales of bonded joints are made to large customers located in the United States. Major U.S. customers consider only those suppliers of bonded joints located in the United States because of these suppliers' proximity to their rail lines, which significantly reduces both freight costs and delivery times and allows better customer service. A small but significant increase in the price of bonded joints would not cause U.S. customers of bonded joints to substitute a different joint or any other type of product, reduce purchases of bonded joints, or turn to suppliers outside the United States, in volumes sufficient to make such a price increase unprofitable. Thus, the development, manufacture, and sale of bonded joints in the United States is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

Like bonded joints, poly joints also are used to electrically isolate track circuits. Unlike bonded joints, the electrical insulation in poly joints is provided by a polyurethane-covered bar that is bolted to the rail. The joint components are not bound together by epoxy, and no mechanism is added to provide additional strength to the joint. Poly joints are not as strong and do not last as long as bonded joints. They are also

[1] This excludes, however, Portec's Coronet products, which are manufactured in the United Kingdom. The Coronet rail joints are based on different specifications than the rail joints manufactured and sold by Portec in the United States. In addition, the Coronet rail joints have never been sold in the United States.

significantly less expensive than bonded joints. Because they are weaker than bonded joints, freight railroads typically use poly joints to create track circuits in areas with lesser loads and traffic than on the main tracks or on other less-heavily used sections of track. Poly joints also may be used as temporary replacements for bonded joints, but only until bonded joints can be installed. Poly joints are used by some passenger railroads or other smaller railroads, which carry less weight on their tracks. A customer whose requirements will be satisfied by a poly joint would rarely, if ever, substitute a bonded joint, even if the price of poly joints were to rise.

The three primary suppliers of poly joints in the United States ship poly joints to customers located throughout the United States. Because all three suppliers are located within approximately 200 miles of one another, customers pay only minimal differences in freight costs. U.S. customers of poly joints consider only those suppliers located in the United States to avoid higher freight costs, reduce delivery times, and allow better customer service.

A small but significant increase in the price of poly joints would not cause U.S. customers of poly joints to substitute a different joint or any other type of product, otherwise reduce purchases of poly joints, or turn to suppliers outside the United States, in volumes sufficient to make such a price increase unprofitable. Thus, the development, manufacture, and sale of poly joints in the United States is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

2. Anticompetitive Effects

Foster's acquisition of Portec likely would substantially lessen competition in the United States for bonded joints and poly joints. For most U.S. customers of bonded joints, Portec and Foster are the two primary suppliers and are often the only suppliers. Currently, Foster and Portec sell approximately 51 and 44 percent, respectively, of U.S. bonded joints. One other company, which does not have the same commitment to research and development as Foster and Portec, accounts for the remaining five percent of sales. If the acquisition is not enjoined, the combined firm would supply approximately 95 percent of bonded joints in the United States and would have a virtual monopoly in that market. Using a measure called the Herfindahl/Hirschman Index ("HHI"), the HHI would increase by approximately 4,500 points, resulting in a post-acquisition HHI of more than 9,000 points.

The possibility of losing sales of bonded joints to each other has often constrained Foster's and Portec's bidding behavior. The competition between Foster and Portec for sales of bonded joints has resulted in lower prices and innovations that have produced higher-quality and longer-lasting joints. Without the competition provided by Portec on bonded joints, Foster would have the incentive and gain the ability profitably to increase prices, reduce quality, reduce innovation, and provide less customer service. The remaining competitor, with only five percent of bonded joint sales, has limited customer acceptance and would not be able to increase its sales post-acquisition sufficiently to discipline the anticompetitive effects of the acquisition.

For most U.S customers, Foster and Portec are two of only three suppliers of poly joints. Currently, Foster and Portec sell approximately 21 and 33 percent, respectively, of poly joints in the United States. The third competitor accounts for the remaining sales in this market. If the acquisition is not enjoined, the combined firm would supply approximately 54 percent of poly joints in the United States. The HHI would increase by more than 1,300 points, resulting in a post-acquisition HHI of more than 5,000 points. The possibility of losing sales of poly joints to each other has often constrained Foster's and Portec's bidding behavior. Competition among the three poly joint suppliers has resulted in lower prices. As the products of the three companies are to some degree different, the acquisition of Portec likely will eliminate the closest competitor to Foster for some customers and thus allow the two remaining competitors to increase prices. Also, because the price levels and the dollar magnitude of the margins are higher for bonded joints than poly joints, any sales diverted from poly joints to bonded joints offer the prospect of additional profits to the merged firm. The acquisition of Portec by Foster would eliminate the significant competition between Foster and Portec and its future benefits to customers. Post-acquisition Foster likely would have the incentive and gain the ability to profitably increase prices and provide less customer service.

If the number of competitors in the U.S. poly joint market is reduced from three to two, Foster and its only remaining competitor will have the incentive and ability to raise prices through coordinated interaction by directly increasing prices, allocating customers, or restricting output or capacity. Unlike in the bonded joint market where post-acquisition Foster will have close to a monopoly, coordination will be more likely or more effective in the poly joint market because, with two significant competitors, both could be reasonably certain of the identity of each other's customers, likely making cheating, such as discounting, easier to detect and discipline. The enhanced ability to detect cheating would be facilitated by, among other things, the fact that bids by public transit companies are often or usually made public.

3. Entry

Sufficient, timely entry of additional competitors into either the U.S bonded joint market or the U.S. poly joint market is unlikely, and the threat of entry thus will not prevent the likely competitive harm resulting from Foster's acquisition of Portec. For bonded joints, rapid, successful, and profitable entry requires that a new supplier develop and successfully operate a production process that consistently produces a large number of high-quality bonded joints that meet the railroads' rigorous specifications. A new supplier of bonded joints also must invest in research and development to meet the railroads' desire for innovation and increased strength and longevity. These capabilities are difficult to obtain, and it takes years for a joint manufacturer to develop the know-how and expertise required to meet customers' qualification requirements. Further, many Class 1 railroads insist that new bonded joints undergo not only laboratory testing, but also several years of in-track testing on the railroads' lines, to ensure that the joints meet the railroads' performance standards under actual usage conditions. Attempts by suppliers to meet a Class 1 railroad's requirements may not be successful, and approval by one railroad does not guarantee approval by others.

Similarly, a new supplier of poly joints in the United States must develop the expertise to manufacture a large number of joints on a consistent base, which could take years. A new poly joint supplier must obtain approvals from its customers, whose rigorous approval processes can take eighteen months or more. Approval by any customer cannot be assured, and approval by one customer does not guarantee approval by any other.

Therefore, entry by new firms or the threat of entry by new firms would not defeat the substantial lessening of competition in the development, manufacture, and sale of bonded joints and poly joints in the United States that likely would result from Foster's acquisition of Portec.

III. Explanation of the Proposed Final Judgment

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects that likely would result from Foster's acquisition of Portec. This divestiture will preserve competition in the development, manufacture, and sale of bonded joints and the development, manufacture, and sale of poly joints by creating an independent, economically viable competitor to Foster in the United States for these products.

The acquirer of the divested assets will obtain from Defendants the assets it needs to replace the competition in the sale of bonded joints and poly joints that would be lost as a result of Foster's acquisition of Portec. The proposed Final Judgment requires Defendants to divest the assets used to manufacture and sell Portec's bonded joints and poly joints, including Portec's facility in Huntington, West Virginia, and the tangible and intangible assets used to manufacture and sell these joints. The tangible assets include, among other things, manufacturing equipment, tooling, inventory, and materials. The intangible assets include, among other things, patents, licenses, intellectual property, know-how, trade secrets, trade names, drawings, specifications, computer software, marketing and sales data, manuals and technical information, and research data. The divested assets will provide the acquirer with the assets it needs to successfully manufacture and sell bonded joints and poly joints in the United States.

This divestiture also ensures that the Huntington facility will be able to operate efficiently. Defendants are required to divest the assets used to manufacture and sell the following other Portec products currently manufactured at the Huntington facility: end

posts, polyurethane-coated gauge and tie plates, fiberglass joint kits, plastic insulation, standard rail joints, compromise and transitional rail joints, and Weldmate joint bars. These assets need to be divested because the products use the same inputs or machinery as bonded joints and poly joints or are closely related or complementary to the bonded joints and poly joints. The assets used to manufacture these related or complementary products will be sold to the acquirer so the acquirer's ability to continue producing bonded joints and poly joints efficiently at that facility will not be impaired. These products together constitute Portec's full line of rail joints and complementary products and will make the acquirer a stronger competitor than if it acquired only the bonded joint and poly joint assets. This full range of products will allow the Huntington facility to be operated as a viable standalone facility.

A few other Portec products currently being manufactured at the Huntington facility, primarily friction management products and Shipping Systems Division ("SSD") products, are not being divested. These products are not related to bonded joints and poly joints and do not use the same equipment or inputs. For example, the friction management and SSD products are merely assembled at Huntington from off-the-shelf parts. As a result, the products not being divested do not directly alter the efficient operation of the bonded joint and poly joint assets.

The proposed Final Judgment designates Koppers Inc. as the company to which the divested assets must be sold. While the United States does not generally require that the purchaser of the divested assets be identified and approved prior to and as a condition of settlement, the unique circumstances of this case necessitate such an approach. In many cases, numerous potential acquisition candidates would be acceptable to the customers and the United States. Also, acquirers in most cases would be able to continue selling the divested products without significant delays made necessary by extensive testing requirements. Here, the upfront designation of the acquirer ensures the sale will be made to an acquirer with the expertise and resources necessary to replace Portec immediately as a full-fledged competitor to Foster.

Because bonded joints and poly joints are critical to the safe and efficient operation of a railroad, customers must be confident that the acquirer of the divested assets will be able to maintain the current quality and long-term reliability of these joints. If the customers lack this confidence, they likely would conduct lengthy in-track testing before purchasing joints from a new supplier in significant quantities. Such lengthy testing periods could mean that the divested Portec joint businesses would not provide meaningful competition to Foster for several years, and, as a result, the divestiture would not remedy the competitive harm that would likely result from Foster's acquisition of Portec. The possibility that customers would require long testing periods before purchasing from an acquirer led the United States to require an acceptable acquirer prior to entering into a settlement.

Defendants presented Koppers to the United States as a potential acquirer of the divested assets. Foster and Koppers entered into an agreement for the purchase of the divested assets on December 9, 2010. Koppers is a global integrated producer of carbon compounds and treated and untreated wood products and services for use in a variety of industries, including the rail industry. In 2009, Koppers had total revenues of approximately $1.12 billion. Approximately 58 percent of its 2009 sales were generated in the United States. Koppers currently supplies all the Class 1 railroads. In addition, Koppers maintains relationships with many short-line and regional rail lines. Koppers has a strong relationship with the Class 1 railroads, an excellent reputation as a supplier to railroads, and is committed to research and development. The United States determined, after a thorough investigation, that railroad customers would be sufficiently confident in Koppers's ability consistently to manufacture quality bonded joints and poly joints and, therefore, would not be likely to insist upon a lengthy in-track testing period for these joints.

The United States typically requires that assets be divested within 60 to 90 days after the filing of the Complaint or five days after the entry of the Final Judgment by the Court. Because the acquirer of the divested assets has been selected and approved by the United States prior to the filing of the Complaint, there is no need for 60 to 90 days to engage in a search for an acquirer. Further, the United States has already reviewed the documents related to the divestiture. Accordingly, the proposed Final Judgment requires that the divested assets be sold to Koppers within ten days after the Court signs the Hold Separate.[2] The entry of the Hold Separate was chosen as the date upon which the divestiture period begins to run because Foster cannot consummate its acquisition of Portec until the Court enters the Hold Separate, and that acquisition must be consummated before the divested assets are sold.

The proposed Final Judgment prohibits Defendants from interfering with any negotiations by Koppers to employ any current or former Portec employee who is responsible in any way for the design, production, and sale of the products being divested. It also requires that Defendants waive any non-compete agreements for current or former employees involved in the design, production, and sale of the products being divested. The proposed Final Judgment also requires that the assets being divested be operational on the date of sale. In addition, the proposed Final Judgment requires that Defendants divest Portec's entire business relating to each of the divested products and not manufacture any products using the intangible assets divested pursuant to the proposed Final Judgment. To allow Foster time to remove the assets used for those products not being divested, the proposed Final Judgment allows Defendants to occupy that portion of the Huntington facility that is used to manufacture the products not being divested for sixty days from the date Foster acquires Portec.

Finally, the proposed Final Judgment requires that Defendants provide advance notice to the United States of any acquisition of the assets of or any interest in, any company in the business of designing, developing, producing, marketing, servicing, distributing, and/or selling bonded joints and/or poly joints, or any company in the business of producing, marketing, distributing, and/or selling friction management products; or any relationship with another company that involves the distribution of friction management products in North America.[3] Until very recently, Foster and Portec competed in the sale of friction management products in the United States. Few competitors sell these products in the United States. Portec is the leader in the development, production, and sale of certain friction management products. Foster was a distributor of friction management products for an overseas manufacturer and it recently terminated its relationship with that manufacturer. However, in the future Foster could begin selling friction management products made by that manufacturer or others. As a result, the proposed Final Judgment ensures that the United States will have the ability to investigate the competitive impact if Foster attempts to resume its sale of friction management products in the United States.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in Federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its

[2] The Hold Separate requires that until the assets being divested are sold according to the terms of the proposed Final Judgment, Foster and Portec must continue to operate their entire businesses as independent, ongoing, and economically viable businesses that are held entirely separate, distinct, and apart. Foster and Portec shall not coordinate their production, marketing, or terms of sale until the assets being divested are sold. It is necessary to keep Portec's entire business separate from Foster's business in the event the divested assets are not sold to Koppers for any reason. If the assets are not sold to Koppers, Foster and Portec will be unable to combine their operations, thereby preserving Portec as an independent competitor in the bonded joint and poly joint markets.

[3] Friction management products are defined as wayside gauge-face lubrication systems, top-of-rail lubrication systems, and any other system or equipment used to lubricate rail.

consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**. Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions preventing Foster's acquisition of Portec. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the development, manufacture, and sale of bonded joints and poly joints in the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.").

As the United States Court of Appeals for the District of Columbia has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case); *United States* v. *Republic Serv., Inc.,* 2010–2 Trade Cas. (CCH) ¶ 77,097, 2010 U.S. Dist. LEXIS 70895, No. 08–2076 (RWR), at *10 (D.D.C. July 15, 2010) (finding that "[i]n light of the deferential review to which the government's proposed remedy is accorded, [amicus curiae's] argument that an alternative remedy may be comparably superior, even if true, is not a sufficient basis for finding that the proposed final judgment is not in the public interest.").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). Therefore, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *Republic Serv.,* 2010 U.S. Dist. LEXIS 70895, at *2–3 (entering final judgment "[b]ecause there is an adequate factual foundation upon which to conclude that the government's proposed divestitures will remedy the antitrust violations alleged in the complaint.").

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations

[4] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[5] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[6]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 14, 2010.

Respectfully submitted, Christine A. Hill (DC Bar No. 461048), U.S. Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530. (202) 305–2738.

Certificate of Service

I, Christine A. Hill, hereby certify that on December 14, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon Defendants L.B. Foster Company and Portec Rail Products, Inc. by mailing the documents electronically to the duly authorized legal representatives of Defendants as follows:

Counsel for L.B. Foster Company

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Counsel for Portec Rail Products, Inc.

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Christine A. Hill, Esquire, United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530. (202) 305–2738.

United States District Court for the District of Columbia

United States of America, Plaintiff

v.

L.B. Foster Company and *Portec Rail Products, Inc.,* Defendants. 10 2115.

Proposed Final Judgment

Whereas, Plaintiff United States of America ("United States") filed its Complaint on December 14, 2010, the United States and Defendants L.B. Foster Company and Portec Rail Products, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

and whereas, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

and whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendants to assure that competition is not substantially lessened;

and whereas, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

and whereas, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged, and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means Koppers, the entity to which Defendants shall divest the Divestiture Assets.

B. "Foster" means Defendant L.B. Foster Company, a Pennsylvania corporation headquartered in Pittsburgh, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Portec" means Defendant Portec Rail Products, Inc., a West Virginia corporation headquartered in Pittsburgh, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Koppers" means Koppers Inc., a Pennsylvania corporation headquartered in Pittsburgh, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. "Divested Portec Product Lines" means Portec's bonded insulated rail joints (assemblies and kits), polyurethane-coated insulated rail joints, end posts, polyurethane-coated gauge and tie plates, fiberglass (CyPly) joint kits, plastic insulation, standard rail joints, compromise and transitional rail joints, and Weldmate joint bars, but excluding Coronet rail joints and end posts manufactured by Coronet Rail Limited.

F. "Divestiture Assets" means:

(1) Portec's facility located at 900 9th Avenue W, Huntington, West Virginia (the "Huntington Facility"), including all equipment located in and around the Huntington Facility that is used in connection with the Divested Portec Product Lines;

(2) All tangible assets that are used for any of the Divested Portec Product Lines, including research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used in connection with any of the Divested Portec Product Lines; all licenses, permits and authorizations issued by any governmental organization relating to any of the Divested Portec Product Lines; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to any of the Divested Portec Product Lines, including supply agreements; all customer lists,

[5] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[6] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

contracts, accounts, and credit records; all repair and performance records and all other records relating to any of the Divested Portec Product Lines;

(3) All intangible assets used in the design, development, production, marketing, servicing, distribution,
and/or sale of any of the Divested Portec Product Lines, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all marketing and sales data relating to any of the Divested Portec Product Lines, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Portec provides to its own employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to any of the Divested Portec Product Lines, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments; and

(4) The Divestiture Assets exclude the trademark, trade name, service mark, or service name "Portec."

G. "Friction Management Products" means wayside gauge-face lubrication systems, top-of-rail lubrication systems, and any other system or equipment used to lubricate rail.

H. "Transaction" means Foster's acceptance for payment of at least 65 percent of the Fully Diluted Number of Company Shares of Portec, as defined in the Agreement and Plan of Merger dated February 16, 2010, between L.B. Foster Company, Foster Thomas Company, and Portec Rail Products, Inc.

III. Applicability

This Final Judgment applies to Foster and Portec, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Divestitures

A. Defendants are ordered and directed, within ten (10) calendar days after the Court signs the Hold Separate Stipulation and Order in this matter, to divest the Divestiture Assets to the Acquirer in a manner consistent with this Final Judgment.

B. Defendants will not interfere with any negotiations by the Acquirer to employ any current or former Portec employee who is responsible in any way for the design, development, production, marketing, servicing, distribution, and/or sale of any of the Divested Portec Product Lines. Interference with respect to this paragraph includes, but is not limited to, enforcement of non-compete clauses and offers to increase salary or other benefits apart from those offered company-wide. In addition, for each employee who elects employment by the Acquirer, Defendants shall vest all unvested pension and other equity rights of that employee and provide all benefits to which the employee would have been entitled if terminated without cause.

C. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale.

D. Defendants shall not take any action that will impede in any way the permitting, operation, use, or divestiture of the Divestiture Assets.

E. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

F. Defendants shall be permitted to occupy, under sublease to the Acquirer or other arrangement, for a period of sixty (60) days from the date the Transaction is closed, that portion of the Huntington Facility that is not currently being used to manufacture any of the Divested Portec Product Lines.

G. Defendants shall divest Portec's entire business relating to each of the Divested Portec Product Lines and will not manufacture any products using any intangible assets divested pursuant to paragraph II(F)(3) of this Final Judgment.

H. Defendants shall, as soon as possible, but within one business day after completion of the relevant event, notify the United States of: (1) The effective date of the Transaction; and (2) the effective date of the sale of the Divestiture Assets to the Acquirer.

I. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV of this Final Judgment shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business involved in the design, development, production, marketing, servicing, distribution, and sale of the Divested Portec Product Lines, that the Divestiture Assets will remain viable, and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures shall be:

(1) Made to an Acquirer that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the design, development, production, marketing, servicing, distribution, and sale of the Divested Portec Product Lines; and

(2) Accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV of this Final Judgment.

VI. Hold Separate

Until the divestiture required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

VII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice Antitrust Division, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If, at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. Notification

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), during the term of this Final Judgment, Defendants, without providing advance notification to the Antitrust Division, shall not directly or indirectly: (a) Acquire any assets of or any interest (including, but not limited to, any financial, security, loan, equity, or management interest) in, any company in the business of designing, developing, producing, marketing, servicing, distributing, and/or selling bonded insulated rail joints and/or polyurethane-coated insulated rail joints, or any company in the business of producing, marketing, distributing, and/or selling Friction Management Products; or (b) enter into any relationship with another company that involves the distribution of Friction Management Products in North America.

Such notification shall be provided to the Antitrust Division in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about bonded insulated rail joints, polyurethane-coated insulated rail joints, and Friction Management Products. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

IX. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

X. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XI. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XII. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 United States District Judge.

[FR Doc. 2010–31863 Filed 12–17–10; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA #343E]

Controlled Substances: Established Initial Aggregate Production Quotas for 2011

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of aggregate production quotas for 2011.

SUMMARY: This notice establishes initial 2011 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act (CSA).

DATES: *Effective Date:* December 20, 2010.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, PhD, Chief, Drug & Chemical Evaluation Section, Drug Enforcement Administration, Springfield, Virginia 22152, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in schedules I and II. This responsibility has been delegated to the Administrator of the DEA by 28 CFR 0.100. The Administrator, in turn, has redelegated this function to the Deputy Administrator, pursuant to 28 CFR 0.104.

The 2011 aggregate production quotas represent those quantities of controlled substances that may be produced in the United States in 2011 to provide adequate supplies of each substance for: the estimated medical, scientific, research, and industrial needs of the United States; lawful export requirements; and the establishment and maintenance of reserve stocks (21 U.S.C. 826(a) and 21 CFR 1303.11). These quotas do not include imports of controlled substances for use in industrial processes.

On September 15, 2010, a notice of the proposed initial 2011 aggregate production quotas for certain controlled substances in schedules I and II was published in the **Federal Register** (75 FR 56137). All interested persons were invited to comment on or object to these proposed aggregate production quotas on or before October 15, 2010.

Seven responses (six from DEA registered manufacturers, and one from a non-DEA registrant) were received within the published comment period, offering comments on a total of 31 schedules I and II controlled substances. The commenters stated that the proposed aggregate production quotas for 3,4-methylenedioxyamphetamine, 3,4-methylenedioxy-N-ethylamphetamine, 3,4-methylenedioxymethamphetamine, 4-anilino-N-phenethyl-4-piperidine, amphetamine (for sale), cathinone, codeine (for sale), dihydromorphine, fentanyl, gamma hydroxybutyric acid, heroin, hydrocodone, hydromorphone, marihuana, meperidine, methaqualone, methylphenidate, morphine (for conversion), morphine (for sale), nabilone, noroxymorphone (for conversion), opium (tincture), oxycodone (for sale), pentobarbital, phencyclidine, remifentanil, secobarbital, tapentadol, tetrahydrocannabinols, thebaine and tilidine were insufficient to provide for the estimated medical, scientific, research, and industrial needs of the United States, for export requirements and for the establishment and maintenance of reserve stocks.

In arriving at the aggregate production quotas, DEA has taken into consideration the above comments along with the factors set forth at 21 CFR 1303.11(b) and other relevant 2010 factors, including 2010 manufacturing quotas, current 2010 sales and inventories, 2011 export requirements, additional applications received, as well as research and product development requirements. Based on this information, DEA has adjusted the initial aggregate production quotas for 3,4-methylenedioxyamphetamine, 3,4-methylenedioxy-N-ethylamphetamine, 3,4-methylenedioxymethamphetamine, amobarbital, cathinone, dimethyltryptamine, ibogaine, lysergic